

STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Vermont Gas Systems, Inc.,)	
for a certificate of public good,)	
pursuant to 30 V.S.A. § 248 ,)	
authorizing the construction of the)	
“Addison Natural Gas Project”)	Docket No. 7970
consisting of approximately 43 miles)	
of new natural gas transmission)	
pipeline in Chittenden and Addison)	
Counties, approximately 5 miles of		
new distribution mainlines in Addison		
County, together with three new gate		
stations in Williston, New Haven and		
Middlebury, Vermont		

**REPLY TO OPPOSITION TO REQUEST FOR SANCTIONS AND CONTEMPT
ORDER**

INTRODUCTION

Ms. Lyons¹ hereby replies pursuant V.R.C.P. 78 to the various filings submitted in opposition to her motion for sanctions and for a contempt order. The purpose of this response is two-fold. First, Ms. Lyons points out that the reply by Vermont Gas Systems, Inc., (VGS), and its associated filings with the Board the same date and four days later, concede facts that demonstrate that VGS has committed an *additional* violation of the Board’s order. Second, Ms. Lyons respectfully submits that VGS’ legal argument ignores the explicit wording of the Board’s December 23, 2013 order.

**VGS’ OWN SUBMISSIONS DEMONSTRATE IT HAS VIOLATED
CONDITION 5 OF THE BOARD’S ORDER**

¹ The seven intervenors in Docket 8643 did not seek to intervene in Docket 7970. Their intent was to raise these issues in Docket 8643. However, in light of the concerns raised by the Board and others, only Ms. Lyons now is seeking sanctions.

The Board's Order carefully addressed where Horizontal Directional Drilling (HDD) would be authorized – and limited HDD to those locations. The Board's Order, at pages 42-44, set forth its findings and conclusions about the use of HDD. HDD is much more expensive than use of a trench, but it can be more protective of wetlands, rivers and threatened species. The order referred to specific sites at which HDD was approved. The specifically identified sites were identified by the Board based on the Alignment Plan submitted by Mr. Heintz of VGS on June 28, 2013. Paragraph 5 of the Board's Certificate of Public Good stated that **“VGS shall use Horizontal Directional Drilling (HDD) as reflected in its 6/28/13 Alignment Plan (as amended to include the use of HDD for all of the Palmer property) and the MOUs.”**

The intent of the Board was that the sites identified in the June 28, 2013 Alignment Plan, plus all of the Palmer property, were the sites at which HDD was authorized – no more and no less. Additional HDD would raise the cost of the project. Less HDD would unduly harm the specifically identified natural resources in the project path. This was the weighing conducted by the Board on pages 42-44.

The former Peyser property in Monkton was not listed by Mr. Heintz in the June 28, 2013 Alignment Plan and was not identified by the Board in its order – but VGS has now admitted that it has commenced construction by means of HDD on the Peyser property and in doing so damaged threatened plant species. Footnote 12 of the July 15, 2016 legal memorandum submitted by VGS' counsel stated that lateral drilling (another name for HDD) was being used on the Peyser property. On July 15, 2016, VGS itself also informed the Board and the parties by letter that it was withdrawing its request for a threatened species taking because it was going to use HDD to cross the land that had been acquired from Mrs. Peyser. On July 19, 2016, VGS submitted a letter to the Board stating that on July 18 an “event” had occurred on what was formerly the Peyser property

in Monkton. The “event” occurred as “contracting were preparing... for a horizontal directional drill.” The “event” consisted of the “inadvertent” disturbance of the threatened species while contractors were cutting vegetation to prepare for the drilling. The letter stated that “we take this matter extremely seriously and will undertake what is necessary to address it before recommencing construction on the property (consistent with the requirements of the certificate of public good).”

HDD is not a risk-free technology. According to the standard manual for use of HDD published by the American Society of Civil Engineers, it is necessary to precede HDD by surveys of surface features and subsurface features. The manual states that the design engineer must visit the site to review surface features before the surface survey is conducted:

Prior to conducting the actual survey, the design engineer should investigate the site to determine the limits of work required for equipment staging and setup, pipe layout, and areas of potential impact such as adjacent utilities or structures. The survey should be performed in an area sufficient in size to show equipment set-up and storage locations...

The survey should be conducted along the proposed drill center-line for a width of approximately 100 ft. Each HDD project has specific staging requirements that should be identified by the design engineer prior to initiating the field survey.

Pipeline Design for Installation by Horizontal Directional Drilling, American Society of Civil Engineers (2d ed. 2104).

VGS has not explained how the taking occurred, but it is evident that VGS was rushing to finish the project. VGS’ July 15, 2016 legal memorandum set forth what VGS believed was the urgent need to finish the project so that gas would be flowing in November. VGS announced, in its Friday, July 15, 2016 letter that it was withdrawing its request for a takings permit because it was going to use HDD – and then, on Monday, July 18, the event occurred during construction. It seems unlikely that a design engineer conducted a pre-survey examination of the site to locate “areas of potential impact” and that a survey was completed prior to commencement of

construction. If these steps had occurred, only a deliberate act of vandalism would have resulted in disturbance of the threatened species. VGS states that the disturbance was “inadvertent,” which suggests that the locations of the threatened species had not been marked by an engineer, surveyor or by VHB’s consultants prior to the commencement of construction.

Ms. Lyons therefore asks that this violation of the Board’s order also be subject to investigation and penalty by the Board and that VGS be ordered to show cause why it should not be held in contempt.

VGS IGNORES THE EXPLICIT WORDING OF THE BOARD’S ORDER

ANR’s July 15, 2016 submission states that the wetlands at Geprags Park “were not accurately depicted in any of VGS’ wetland permit applications and... none of the permits include allowance for impacts to newly found wetlands and buffers” in the Park (page 1). Therefore, VGS must “obtain a new wetland permit” for the Geprags Park portion of the project (pages 1, 2).

VGS’ July 15, 2016, legal memorandum argues that so long as it has a wetlands permit for the Geprags Park segment of the project *before it commences construction at the Geprags Park segment*, it is compliance with Board’s Order. VGS’ position is that the Order allows it to construct elsewhere even though the Geprags Park segment of its PSB-approved pipeline route no longer is supported by a wetlands permit – and that it had no duty to even notify the Board and the parties that it no longer had an ANR wetlands permit for that segment of the PSB-approved route.

VGS ignores the explicit wording of the Order. The Order stated that all ANR permits must be in hand for the entire project before construction can commence on any segment of the project. This requirement originated with ANR.

ANR maintains that with the mitigation measures and terms and conditions outlined in the VGS-ANR MOU, exh. VGS-ANR-Joint-1, the Project will not result in an undue adverse impact to the natural environment. In

addition, ANR recommends that the Board impose as a condition of any CPG issued for this Project, that VGS be required to obtain **all necessary state and federal permits for the entire Project (not segments of the Project) before commencement of construction or ground clearing**, including the Vermont Stream Alteration Permit, the Vermont Wetland Permit, the 401 Water Quality Certification, the National Pollutant Discharge Elimination System ("NPDES") Stormwater Permit, and the Army Corps of Engineers Section 404 Permit.

Order p.19 (emphasis added).

The Board agreed:

Our approval of the Project is conditioned upon VGS compliance with the VGS-ANR MOU in which, among other things, VGS agreed to obtain all necessary permits for the Project. This included the following four permits from ANR:

- the NPDES construction stormwater discharge permit;
- the ANR wetland permit;
- the ANR 401 water quality certification; and,
- the ANR stream alteration permit.

VGS also must obtain the following permits for this Project:

- the ACOE 404 permit; and
- the Vermont Department of Transportation ("VTrans") permit.

In its Proposal for Decision, VGS recommended that the Board adopt the following condition:

Prior to proceeding with construction in any given area, the Petitioner shall obtain all necessary permits and approvals, as required for the proposed construction activities in that area. Construction, operation and maintenance of the proposed Project shall be in accordance with such permits and approvals, and with all other applicable regulations, including those of the Vermont Agency of Natural Resources and the U.S. Army Corps of Engineers.

ANR recommended a similar position in its brief that stated:

[the] Petitioner shall obtain all necessary state and federal permits before commencement of construction or ground clearing, including Vermont Stream Alteration Permit, Vermont Wetland Permit, 401 Water Quality Certification, NPDES Stormwater Permit, Army Corps of Engineers 404

Permit.

These parties explained their disagreement in Reply Briefs. According to ANR, each of the ANR permits cover or authorize activity for the entire project, rather than having separate permits for each wetland or stream crossing. **ANR states that it "cannot agree to allow construction to commence on one segment of the project before it has issued its permits for the entire project."** Moreover, ANR contends that the Section 404 permit and VTrans permit are tied to one or more of the ANR permits or certifications.

For its part, VGS states that it does not object to ANR's proposed condition, but requests that "it be appropriately tailored to the specific activities that are the subject of the collateral permits." VGS's "tailoring" does not actually modify ANR's proposal, but instead requests that the Board adopt VGS's original language. VGS explains that considering the size of the Project, "not all portions of the project may be subject to the same set of collateral permits." VGS maintains that ANR's condition would unduly delay construction by requiring receipt of all collateral permits before construction may begin. VGS asks that, if a collateral permit has not been issued (such as for a municipal road crossing), that the Board not limit construction in other areas in which the permit is not applicable.

Assuming ANR is correct that it will issue only the four specified permits (each encompassing the entire project) — and the Board has no basis not to accept ANR's assertions — VGS will not receive the required environmental permits in stages. This includes the stormwater permit that would apply to all site preparation and construction activities. As a result, VGS would not have the requisite permits for one area that would be necessary to trigger the operative language in VGS's proposal that would authorize phased construction.

Order pp.114-115. The Board stated that VGS position that it should be allowed phased permitting raised important questions of public policy: "Setting aside the practical effect, however, the parties' disagreement raises broader questions concerning whether a phased construction such as that proposed by VGS is either legally permissible or sound policy." Order p 116. The Board concluded that public policy required that all ANR permits for the entire project be in hand prior to construction anywhere.

In this proceeding, VGS has presented some direct evidence on environmental criteria, but the Company has also presented testimony that it intended to rely upon the underlying environmental permit to demonstrate compliance. Accordingly, VGS must obtain the environmental permits prior to being authorized to commence site preparation or construction. Requiring receipt of all environmental permits avoids a situation in which an applicant commences construction, then receives an environmental permit with conditions that materially

impact the decision to construct the project at all.

Our conclusion in this case that a permit must be received prior to commencement of any construction applies only to permits on which the Board relies as part of the evidentiary basis for our decision. Thus, it does not apply to municipal road crossing permits that the Company will need to obtain for the Project. However, it does apply to the environmental permits issued by ANR and the Army Corps of Engineers, as well as to the VTrans permit. Accordingly, we hereby adopt the following condition:

The Petitioner shall obtain all necessary permits from the Agency of Natural Resources, the U.S. Army Corps of Engineers, and the Vermont Agency of Transportation before commencement of construction or site preparation. This includes the Vermont Stream Alteration Permit, Vermont Wetland Permit, Section 401 Water Quality Certification, NPDES Stormwater Permit, and Army Corps of Engineers Section 404 Permit. Prior to proceeding with construction in any given area, the Petitioner shall also obtain all other necessary permits and approvals required for the proposed construction activities in that area. Construction, operation and maintenance of the proposed Project shall be in accordance with such permits and approvals, and with all other applicable regulations, including those of the Vermont Agency of Natural Resources and the U.S. Army Corps of Engineers.

VGS' legal memorandum takes the second sentence of the paragraph – which says that Petitioner shall *also* obtain all *other* permits segment by segment – and applies that paragraph to the ANR permits. VGS' position is nothing short of brazen.

VGS also submits the misleading argument that the missing Geprags Park wetland permit is no different from the substantial change orders it has obtained, with correlative changes to wetland permits. VGS ignores a critical distinction. In each of those situations *the Board's approved route did not change until after the wetlands permits had been amended* to address the changed locations. Construction remained proper under Condition 3 because all segments of the Board-approved route had ANR permits. That is no longer true. VGS knew that this was no longer true on June 17. It chose to remain silent and continue construction despite its obligations as a regulated utility and permittee.

VGS also appears to be suggesting the frivolous argument that so long as it *thought* it had all needed permits in hand when it started construction, it was free to continue construction after it learned that it actually had *never* had a permit for disturbing significant wetlands in the route it had obtained Board approval to construct. What would be a good faith defense to conduct prior to learning of the missing permit does not justify continued construction after VGS learned that it had never possessed the needed ANR permit for one segment of the project.

The management of VGS, having learned of the error, should have immediately halted construction and notified the Board and the parties. If management believed there was an urgent need to resume construction, the only proper response would have been to file an emergency request of the Board to allow it to resume construction while the needed permit was being sought. Instead, VGS took the law into its own hands.

CONCLUSION

Ms. Lyons asks that the Board immediately issue an order that VGS show cause why construction should not cease and why it should not be held in contempt for its past and ongoing violations of the Board's December 23, 2013 Order, that the Board conduct an investigation of this matter and that the Board impose appropriate sanctions,

Dated at Bristol, Vermont, this 27th day of July, 2016.

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